FILED
FEB 23 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 794

THE UNITED STATES OF AMERICA, ON THE RELATION OF RAYMOND J. NITKEY, AND RAYMOND J. NITKEY IN HIS OWN BEHALF,

Petitioner,

vs.

CHARLES G. DAWES, ET AL.,

Respondents.

BRIEF ON BEHALF OF ALL DEFENDANTS-RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

ANDREW J. DALLSTREAM,
ARTHUR M. COX,
FREDRIC H. STAFFORD,
JOHN B. ROBINSON, JR.,
231 S. La Salle Street,
Chicago, Illinois,
Attorneys for Defendants-Respondents.

PAM, HURD & REICHMANN,
JOHN F. CASHEN, JR.,
Of Counsel.

THE BLAKELY PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Statement	1
Statement of the Case	3
The Questions Involved	5
Summary of Argument	6
Argument	8
The Statute Involved in Exploration Co. v. United States Is a Conventional Statute of Limitations	9
Section 235, Involved in the Case at Bar, Is Not a Statute of Limitations; Its Requirements Are Jurisdictional	12
Petitioner Has Admitted That There Was No Concealment	19
Reply to Petitioner's Other Arguments	21
Conclusion	27

TABLE OF CASES, TEXT BOOKS AND STATUTES CITED.

Cases.

A. G. Reeves Steel Construction Co. v. Weiss, 119 F. 2d 472 16

A. J. Phillips Company v. Grand Trunk W. R. Co., 236 U. S. 662 ..... 13, 16

Atlantic Coast Line R. Co. v. Burnette, 239 U. S. 199.. 15

Bay City v. Frazier, 77 F. 2d 570..... 25

Bell v. Wabash Ry. Co., 58 F. 2d 569.....15, 17

Briggs v. Brushaber, 5 N. W. 383..... 26

Compagnie Generale Transatlantique v. United States, 51 F. 2d 1053..... 15

Danzer & Co. v. Gulf & Ship Island R. R., 268 U. S. 633 15

Exploration Co. v. United States, 247 U. S. 435....6, 8, 18

Finn v. United States, 123 U. S. 227..... 15

First National Bank v. Steel, 109 N. W. 423..... 26

Kansas City So. R. R. v. Wolf, 261 U. S. 133..... 15

Lynch v. United States, 80 F. 2d 418..... 15

Merlau v. Kalamazoo Circuit Judge, 147 N. W. 503.. 26

Midstate Horticultural Co. v. Pennsylvania R. Co., 320 U. S. 356 .....13, 14, 16

Pennsylvania R. R. v. Carolina Portland Cement Co., 16 F. 2d 760..... 16

Pollen v. Ford Instrument Co., 108 F. 2d 762....15, 17, 18

Quinn v. Press, 140 S. W. 2d 438..... 26

Rawlings v. Ray, 312 U. S. 96..... 24

Rosenberg v. Hano & Co., 26 F. Supp. 160..... 16

Stimpson Computing Scale Co. v. Lucas, 39 F. 2d 473.. 16
Thayer v. Kansas Loan & Trust Co., 100 Fed. 901.... 26
United States v. Chicago Golf Club, 84 F. 2d 914..... 15
United States v. Hess, 317 U. S. 537..... 23
United States v. Koleno, 226 Fed. 180.....11, 12
United States v. Trollinger, 81 F. 2d 167..... 15
United States v. Wardwell, 172 U. S. 48..... 15
United States ex rel. Louisville Cement Co. v. Interstate Commerce Commission, 246 U. S. 638.....13, 16
White v. Gordon, 279 P. 289..... 26
Williams v. United States, 63 Ct. Cl. 668 (cert. den. 275 U. S. 539)..... 16
Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 F. 2d 459 .....15, 16

Rules of U. S. Supreme Court.

Rule 38, paragraph 5..... 8

Texts and Statutes.

110 A. L. R. 1178..... 26
128 A. L. R. 762..... 26
Act of March 3, 1891, 43 U. S. C. § 1166.....10, 11, 12
Informer's Act, 31 U. S. C. §§ 231-235, inclusive..... 2
National Banking Act, 12 U. S. C. § 161..... 20

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No. 794.

THE UNITED STATES OF AMERICA, ON THE RELATION OF RAYMOND J. NITKEY, AND RAYMOND J. NITKEY IN HIS OWN BEHALF,

Petitioner,

vs.

CHARLES G. DAWES, ET AL.,

Respondents.

BRIEF ON BEHALF OF ALL DEFENDANTS-RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

STATEMENT.

MAY IT PLEASE THE COURT:

Petitioner's presentation of the subject matter and the issues involved in the litigation in the Circuit Court of Appeals, and of the questions presented and decided in the decision of which a review is sought, contains several misstatements which require clarification, the more flagrant of which we will group and point out.

Throughout this brief we shall refer to Sections 231 to 235, inclusive, of Title 31 of the United States Code, under which the suit was brought, as the "Informer's Act" (petitioner's brief, 40-42); to Reconstruction Finance Corporation as "R.F.C."; to Central Republic Bank and Trust Company as "Central Republic"; and to defendant City National Bank and Trust Company of Chicago as "City National".

STATEMENT OF THE CASE.

Petitioner states (Br. 9) that this suit "relates to a Government loss of some fifteen million dollars as the result of a $90,000,000 loan" to Central Republic in 1932. However, the collections by the R. F. C. upon that loan, as pointed out by the Circuit Court of Appeals in its opinion (R. 96), have resulted in the recovery by the R. F. C. of $90,000,000, plus its expenses amounting to almost $3,500,000, plus the additional sum of more than $9,500,000.

Also, petitioner has repeatedly misstated the holding of the Circuit Court of Appeals, saying, among others, the "Court also holds that the period of six years begins to run before the accrual of a cause of action" (Petition 3); the court "takes the position that no suit could be brought after the expiration of six years from 1932 * * * by showing that a complete and present cause of action had not accrued during that period" (Br. 10); and, impliedly, that the Circuit Court of Appeals affirmed the portion of the District Court's order which sustained the right of the Attorney General to appear (Petition 5).

The Circuit Court of Appeals simply held that the District Court never acquired jurisdiction. Its reason for sustaining the ruling of the District Court on this point is that the requirements of Section 235 of the Informer's Act are jurisdictional and strictly limit the power of the District Court to assume jurisdiction, that such section is not to be tolled or extended because of fraud or concealment, and that no acts in violation of the Informer's Act are alleged to have occurred within six years prior to the filing of the action (R. 94-95, 97).

Petitioner also frequently states as a fact, but in varying form, that the Circuit Court of Appeals has decided certain matters on the merits and has made certain findings of fact without having afforded petitioner an opportunity to present proof thereon. Some of these assertions are general (Petition 2; Br. 10); others relate to adverse findings as to the value of collateral (Petition 7); findings of no proof of fraud (Br. 10, 15) and of no concealment (Br. 14); a finding of no proof "that reliance was placed upon the assets in making the loan" (Br. 15); and a finding of "no misrepresentation of the value of assets pledged for the loan" (Br. 16).

The error in these assertions is apparent for, since the Circuit Court of Appeals decided the fundamental question presented and held that the District Court never acquired jurisdiction of the subject matter, said court could not and did not make any finding on any other question.

Petitioner charges (Petition 4-5, 7; Br. 10) that the Circuit Court of Appeals plainly intended its opinion to relieve the defendants from any charge of improper conduct and to that end relied upon the report of the receiver of Central Republic set out in its opinion (R. 96).

That these reflections are completely unwarranted is clear from the statement of the Circuit Court of Appeals in its opinion immediately following a quotation from petitioner's brief filed in that court (R. 95, 96):

> "We think this statement is unwarranted from the facts disclosed, and for that reason we are not content to rest our decision upon the mere statement that the district court was without jurisdiction, lest uninformed creditors might inferentially conclude that plaintiff's action had been disposed of as the result of a mere technicality, and that thus a grievous crime was being shielded by the aid of Government agencies,—the R.F.C., the Comptroller of the Currency, and his Gen-

eral Counsel, whose names we mention because they had full knowledge of all the facts. This inference of guilt would necessarily include the Attorney General, who, after becoming acquainted with all the facts, chose not to prosecute an appeal on behalf of the Government."

It is thus apparent that the court felt impelled to defend those officials and agencies mentioned by it, so far as it could, from the unwarranted and unjust inference of wrongdoing created by the statements and innuendoes contained throughout petitioner's brief in that court.

We respectfully submit that the opinion of the Circuit Court of Appeals is clear and concise, and that it is indeed strange if petitioner feels aggrieved by the statements contained therein, as indicated by his repeated complaints thereon to this Court, that he did not file a petition for rehearing with the Circuit Court of Appeals.

The Questions Presented.

Petitioner correctly states that the only question presented by the opinion of the Circuit Court of Appeals is that as to lack of jurisdiction (Petition 5); but this is followed by the erroneous statement "and this issue is limited to the construction of the statute requiring suit to 'be commenced within six years from the commission of the act, and not afterward.'" In addition to the construction of the statute, the inquiry as to lack of jurisdiction also embraces the question whether or not the amended complaint charges the commission of any act by any defendant in violation of Section 231 of the Informer's Act within six years before the commencement of the suit.

None of the other matters mentioned by petitioner under this heading (Petition 5, 6) is involved in or presented by the decision sought to be reviewed.

Summary of Argument.

The sole reason relied upon by petitioner as to why the writ should be allowed is that the decision of the Circuit Court of Appeals is probably in conflict with the decision of this Court in *Exploration Co.* v. *United States*, 247 U. S. 435.

The statute relied upon in the *Exploration Co.* case is entirely different from the statute involved in the present case. In that case the statute was a conventional statute of limitations and consequently could be tolled or extended by virtue of fraudulent concealment.

The provisions of Section 235 of the Informer's Act are jurisdictional and, therefore, cannot be tolled or extended by fraudulent concealment or otherwise. Accordingly, the decision of the Circuit Court of Appeals sustaining the dismissal of the suit for lack of jurisdiction is entirely in harmony with and supported by the applicable decisions of this Court, and hence the petition should be denied.

Moreover, petitioner's repeated references to fraudulent concealment are erroneous and misleading for, as the record shows, petitioner has admitted that the government agencies and officials concerned were fully acquainted with the facts.

With one exception, all of the allegations of the amended complaint relate to acts committed in 1932—more than ten years prior to the institution of this suit—and, consequently, they cannot constitute acts which bring this suit within the jurisdiction of the District Court. Nor does the one exception—viz., the filing of alleged false reports by City National with the Comptroller of the Currency thrice annually, constitute such an act because each of the acts relating to fraudulent claims and made actionable under the Informer's Act relate only to causing the government

to pay such claims, and the last payment of any money involved herein occurred in October, 1932, more than six years before this suit was filed.

Those parts of the balance of petitioner's argument which relate to questions upon the merits but are interrelated with his alleged reasons for allowing the writ are erroneous.

ARGUMENT.

Under the heading "Reasons Relied upon for Allowance of Writ" (Petition 6), petitioner has set forth no "special and important reasons" at all. He merely states that it is important that his contentions upon the merits be reviewed. This, of course, falls far short of the requirements of Rule 38, paragraph 5, of this Court.

Turning elsewhere, however, under the paragraph dealing with jurisdiction of this Court (Petition 5) petitioner asserts that in the case at bar the Circuit Court of Appeals "has decided a Federal question in a way probably in conflict with applicable decisions of this Court", citing the aforesaid rule of the Court. This statement is amplified elsewhere in the petition and brief (Petition 3, 6; Br. 13-14).

It is clear, therefore, that this is the only "special and important reason" within the meaning of Rule 38 relied upon by petitioner as to why the writ should be allowed. In support of this contention petitioner points only to *Exploration Co.* v. *United States*, 247 U. S. 435, as an alleged applicable decision of this Court (Petition 3, 6; Br. 13-14).

As admitted by petitioner (Br. 13), the Circuit Court of Appeals concluded that the requirements of Section 235 of the Informer's Act are jurisdictional, and are not tolled or extended on account of fraud or concealment of fraud (R. 94-95, 97). Petitioner, however, claims that this conclusion is contrary to the decision of this Court in the *Exploration Co.* case on the theory that the statute there involved and Section 235 of the Informer's Act, involved in the case at bar, are each "a general statute with a clause limiting the period of suit" and that the "language used by the two is legally identical." (Br. 13). Such contention is untenable.

The statute involved in the *Exploration Co.* case is a conventional statute of limitations. It created a bar to the assertion or enforcement of a right or remedy which existed prior to the enactment of such statute of limitations and which was enforceable in any court of general jurisdiction. Said statute, being merely a statute of limitations, can be waived, tolled, extended or in any other manner defeated by agreement of the parties, waiver, failure to plead or otherwise.

Section 235, on the other hand, is an integral part of a statute which creates new causes of action and confers jurisdiction upon specifically designated courts to entertain said causes of action. Being a part of such statute, it constitutes a limitation upon, and a condition to, the jurisdiction previously conferred in and by the same statute. The distinction between the two types of statutes is well established and has been frequently recognized and applied by this Court.

The Statute Involved In Exploration Co. v. United States Is A Conventional Statute of Limitations.

In the excerpts from the *Exploration Co.* case set forth by petitioner (Br. 13, 14) this Court specifically referred only to *statutes of limitations,* clearly showing that this Court considered the statute there involved as a mere statute of limitations. Throughout his petition and brief, however, petitioner has confused statutes of limitations and jurisdictional statutes, and we therefore feel compelled to set forth the facts involved and the conclusions reached by this Court in that case, which petitioner has wholly neglected to do.

In the *Exploration Co.* case the United States brought a suit in the United States District Court to cancel certain

land patents on the ground that they had been procured from the United States by fraud. The suit was brought about eight and one-half years after the dates of the patents, but the bill alleged that the fraud by which the patents were obtained was self-concealing in its nature, was concealed from the government by the wrongdoers, and was not discovered until approximately two years prior to the filing of the suit. The defendants demurred on the ground that the suit was barred by the six-year *statute of limitations,* being the act of March 3, 1891 hereinafter more fully referred to. The demurrer was sustained and, on ultimate appeal to this Court, such ruling was held in error.

At the very outset of its opinion this Court recognized and characterized the statute involved in that case as a conventional statute of limitations, for in the opening paragraph this Court said (p. 445):

> "The question presented for our consideration is whether the suit was barred by the statute of limitations under the Act of March 3, 1891, 26 Stat. 1093, which provides:
>
> > " 'That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.' "

And, in the concluding paragraph of its opinion, this Court said in part (p. 449):

> "We are aware of no good reason why the rule, now almost universal, that *statutes of limitations* upon suits to set aside fraudulent transactions shall not begin to run until the discovery of the fraud, should not apply in favor of the Government as well as a private individual." (Italics supplied.)

The nature of the statute involved in the *Exploration Co.* case and its effect upon suits instituted by the United States to annul land patents for any reason whatsoever is fully explained by the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Koleno,* 226 Fed. 180. In that case suit was brought by the United States to recover the value of certain land patented by the United States to the defendant Koleno because of the alleged fraud of said Koleno. A demurrer was filed which presented, among other things, the effect upon the right to maintain the suit of the Act of March 3, 1891, which is the same statute as that involved in the *Exploration Co.* case.

The Circuit Court of Appeals also recognized that said Act was strictly a statute of limitations. After first observing that generally a statute of limitations does not run against the United States, and after setting forth the Act, the court said, at page 182:

> "The present concern is, not whether this would operate as a limitation upon an action by the government for damages for deceit, but whether the government had an action for deceit before this statute was passed, but which should be denied it since its passage even within the period fixed for bringing suit to annul the patent. *This statute was strictly one of limitation and did not create the right to maintain an action to set aside the patent.* Patents procured from the United States by fraud were never void, but voidable (Moran v. Horsky, 178 U. S. 205, 20 Sup. Ct. 856, 44 L. Ed. 1038; United States v. Stinson, 197 U. S. 200, 25 Sup. Ct. 426, 49 L. Ed. 724); * * * If a fraud had been prepetrated upon the government in the issuance of the patent it had *before the statute of limitations act* was passed the right of its election of remedies; it might elect to rescind the voidable patent, or it might elect to ratify it and sue for damages." (Italics supplied.)

And again, after discussing the powers of the Attorney General and the Department of Justice as to making elections for the government, the Court said, at page 184:

> "This was *before the statute of limitations cited was passed*, and clearly corroborates the assumption that the *right* to maintain the action to annul a patent *was not created by the statute cited*, but the statute was one *purely of limitation.*" (Italics supplied.)

Thus, it is clear that prior to the Act of March 3, 1891 the United States always had the right to vacate and set aside land patents for fraud or otherwise. That Act was only a self-imposed limitation upon such right of the government so that conjecture with respect to titles based upon such patents might be finally set at rest. That Act created no new cause of action, right or remedy; neither did it give to the government any rights which it had not theretofore enjoyed. It conferred no jurisdiction upon any particular court. The government remained free to sue in any court of its own selection after passage of the Act, just as it had been before such passage. All that was done by this Act was to impose upon the United States a time limitation upon the exercise of a previously existing right and remedy.

Section 235, Involved In The Case At Bar, Is Not A Statute of Limitations; Its Requirements Are Jurisdictional.

The Act of March 3, 1891, involved in the *Exploration Co.* case, is complete within itself and is concerned solely with limiting the period within which the government may exercise existing rights. It is in no way connected with the creation of any new cause of action or conferring of jurisdiction.

Section 235 of the Informer's Act, however, is not a statute of limitations, such as the Act of March 3, 1891. On

the contrary, it is a jurisdictional limitation upon the exercise of a newly created right of action or remedy in a particular class of courts upon which jurisdiction to hear and determine such new right of action or remedy is conferred by the same statute. It is but a single section of a complete statute. Section 231 of that statute creates for the first time causes of action available to informers which they did not theretofore possess. Section 232 of the same statute confers exclusive jurisdiction upon the United States District Courts (whose jurisdiction has always been limited by statute) to hear and determine such new causes of action. Sections 233 and 234 of that statute are immaterial here. Lastly, Section 235 prescribes the period within which, and not afterward, such causes of action must be sued upon and such jurisdiction invoked.

We submit that the holding of the Circuit Court of Appeals that Section 235 is jurisdictional and strictly limits the power of the District Court to assume jurisdiction (R. 94-95, 97) is entirely consistent with and correctly follows the applicable decisions of this Court. We refer particularly to *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638; *A. J. Phillips Company* v. *Grand Trunk W. R. Co.*, 236 U. S. 662; *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356.

In the *Louisville Cement* case this Court held that the requirement of Section 16 of the Interstate Commerce Act that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after," was not a mere statute of limitations but was *jurisdictional*. As stated in the *Louisville Cement* case (246 U. S., at 642) the same holding was made with reference to suits filed in the District Court in the earlier decision in the *Phillips* case.

In the most recent decision, the *Midstate Horticultural* case, this Court reiterated its earlier holdings that the provisions of Section 16 of the Interstate Commerce Act are jurisdictional (320 U. S., at 364) and ruled that an agreement expressly *waiving* the "benefit" of the time provisions of such section was invalid. Since the provisions are jurisdictional, they obviously could not be waived because jurisdiction cannot be conferred upon any court by consent of the parties.

The analogy between the provisions of the Interstate Commerce Act and the provisions of Sections 231, 232 and 235 of the Informer's Act is perfect and complete.

In the *Louisville Cement* case the right to file complaints with the Commission was created, and the jurisdiction of the Commission to hear such complaints was conferred, by Section 13 of the Interstate Commerce Act (corresponding to Sections 231 and 232 of the Informer's Act) and the time provisions for filing such complaints were contained in Section 16 of the Interstate Commerce Act (corresponding to Section 235 of the Informer's Act).

In the *Phillips* case the right of action was created by Section 8 of the Interstate Commerce Act, and jurisdiction of suits to enforce such right was conferred upon the District Courts by Section 9 of said Act (again corresponding to Sections 231 and 232, respectively, of the Informer's Act) and the time provisions limiting the period for instituting such suits were again contained in Section 16 (again corresponding to Section 235 of the Informer's Act).

The decisions by this Court that the time provisions of Section 16 of the Interstate Commerce Act in each case limited the jurisdiction previously conferred by Section 13 upon the Commission and by Section 9 upon the District Courts to hear such complaints or suits, respectively, irresistibly require the conclusion here that the jurisdiction

of the District Courts initially conferred by Section 232 of the Informer's Act to hear suits involving violations of Section 231 of that Act is equally limited by the subsequent time provisions of Section 235 of the same Act.

Similar provisions limiting the time within which suit must be commenced contained in various other statutes have uniformly been, either specifically or in effect, held jurisdictional. We refer to the following decisions of this Court:

Atlantic Coast Line R. Co. v. *Burnette,* 239 U. S. 199;

Finn v. *United States,* 123 U. S. 227;

United States v. *Wardwell,* 172 U. S. 48;

Danzer & Co. v. *Gulf & Ship Island R. R.,* 268 U. S. 633;

Kansas City So. R. R. v. *Wolf,* 261 U. S. 133.

The foregoing decisions have been consistently followed and applied in repeated decisions of the inferior Federal courts:

Wisconsin Bridge & Iron Co. v. *Illinois Terminal Company,* 88 F. 2d 459 (C. C. A. 7th, 1937).

United States v. *Chicago Golf Club,* 84 F. 2d 914 (C. C. A. 7th, 1936).

Compagnie Generale Transatlantique v. *United States,* 51 F. 2d 1053 (C. C. A. 2nd, 1931).

United States v. *Trollinger,* 81 F. 2d 167 (C. C. A. 4th, 1936).

Lynch v. *United States,* 80 F. 2d 418 (C. C. A. 5th, 1935).

Bell v. *Wabash Ry. Co.,* 58 F. 2d 569 (C. C. A. 8th, 1932).

Pollen v. *Ford Instrument Co.,* 108 F. 2d 762 (C. C. A. 2nd, 1940).

Pennsylvania R. R. v. *Carolina Portland Cement Co.*, 16 F. 2d 760 (C. C. A. 4th, 1927).

A. G. Reeves Steel Construction Co. v. *Weiss*, 119 F. 2d 472 (C. C. A. 6th, 1941).

Stimpson Computing Scale Co. v. *Lucas*, 39 F. 2d 473 (D. C., W. D., Ky., 1927).

Rosenberg v. *Hano & Co.*, 26 F. Supp. 160 (D. C., E. D., Pa., 1938).

Williams v. *United States*, 63 Ct. Cl. 668 (cert. den. 275 U. S. 539).

Petitioner's only attempt to distinguish the applicability here of the foregoing cases consists of the bald assertion that none "involves fraud or is relevant to the issue under consideration" (Br. 14). He refers specifically, however, to only *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, *A. J. Phillips Company* v. *Grand Trunk W. R. Co.*, 236 U. S. 662, and *Wisconsin Bridge and Iron Co.* v. *Illinois Terminal Co.*, 88 F. 2d 459.

Whether or not these decisions did "involve fraud" is immaterial, for that is not the test. The true criterion is that stated and applied by this Court, speaking through Mr. Justice Rutledge, in *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356 (1943), where it is said at page 359:

> "* * * and in this case, consistently with the pattern, the debate has moved back to whether the cause of action is one created by the statute or one arising from the common law, with the attributed consequence in the one case that the bar is absolute and invariable by any act of the parties, in the other that it may be waived by contract or otherwise."

Since Section 235 is a part of the Informer's Act, which created the cause of action and under which petitioner

brought the case at bar (Petition 1, R. 15), it follows that the bar of the time provisions of Section 235 is absolute and invariable, and that the District Court never acquired jurisdiction. The decisions above referred to are not only "relevant to the issue under consideration", contrary to petitioner's assertion that they are not (Br. 14), but they also are the applicable decisions of this Court upon the question involved.

In view of the fact that the bar of the time provisions of Section 235 is absolute and invariable by any act of the parties, it necessarily follows that concealment of the cause of action, "fraudulent concealment" (so frequently charged by petitioner), or any other concealment cannot extend, toll, or in any manner affect such bar. Such is the uniform ruling by the federal courts upon this question in all cases which research has disclosed. It is the precise ruling of the two cases cited by the Circuit Court of Appeals in support of its holding on this point, viz., *Pollen* v. *Ford Instrument Co.*, 108 F. 2d 762, and *Bell* v. *Wabash Ry. Co.*, 58 F. 2d 569.

In the *Bell* case the Circuit Court of Appeals for the Eighth Circuit said at page 572:

> "* * * There could be no waiver of this provision as there might be of the statute of limitations. The time would not be extended by fraud practiced or concealment such as might effect an extension of an ordinary statute of limitations under certain circumstances."

Petitioner's attempt to distinguish the *Bell* case because it "involved no issue of fraud" (Br. 14) is, for the same reasons above stated, as ineffectual as his prior effort to distinguish the decisions of this Court hereinabove referred to.

Petitioner has not even attempted to distinguish the *Pollen* case. Instead, he has sought to present that decision

as an authority in support of his cause, in spite of the unqualified holding to the contrary there made. He has plucked from the entire opinion only one isolated sentence, but he studiously avoids any statement as to the facts or the decision in that case or reference to any other portion of the opinion.

In the *Pollen* case the plaintiffs claimed that the statutory provision there involved (prohibiting recovery of profits or damages for patent infringement committed more than six years before commencement of infringement proceedings) was tolled or extended because of the alleged fraudulent concealment of the infringements charged by the plaintiffs. Plaintiffs there, like petitioner here, relied upon the rule pronounced in *Exploration Co.* v. *United States*, 247 U. S. 435.

After stating said rule in the language quoted by petitioner (Br. 14), the Court went on to say in the same paragraph (108 F. 2d 763) as follows:

> "* * * But the rule that concealment postpones the running of limitations does not touch suits for patent infringement. The provision in the patent law that there shall be no recovery for infringements committed more than six years before suit *is not a mere statute of limitation.* It is a part of the statute which *creates the liability and gives the right of action.* It is a condition on the right, not on the remedy, and it is not subject to the disabilities or excuses by which ordinary statutes of limitation may be avoided by a plaintiff. Peters v. Hanger, 4 Cir., 134 F. 586. Where the time for commencing action is prescribed in the statute which creates the liability and gives the right of action, *the time is not extended by reason of fraud or concealment which might work an extension of ordinary statutes of limitation.* * * * It follows that the plaintiffs may not recover for infringements com-

> mitted more than six years before suit, *whether or not the defendant concealed infringements from them.* We are not of course holding that there was in fact such concealment." (Italics supplied.)

The foregoing statements and decision by the Court in the *Pollen* case clearly refute not only petitioner's reliance upon that case but his entire position as stated in his petition and brief.

We submit that for the reasons hereinabove stated the decision of the Circuit Court of Appeals, sustaining the ruling of the District Court in dismissing the action for lack of jurisdiction, is entirely in harmony with and completely supported by the applicable decisions of this Court and that accordingly, no other reason for the allowance of the writ being urged in the petition, the petition should be denied.

Petitioner Has Admitted That There Was No Concealment.

Aside from the fact that the doctrine of fraudulent concealment does not apply to the time provisions of a jurisdictional statute such as Section 235 of the Informer's Act, the record in this case clearly shows, and petitioner has admitted, that there was no concealment from the government of any of the facts involved in this case.

He specifically admits (R. 65):

> "Plaintiff further admits that the facts as to the loan were in the possession of the Reconstruction Finance Corporation, a federal agency; and that the facts as to the transfer of $50,000,000 to the new and defendant bank (the individual defendants being officers or directors of both the old and the new banks) were in possession of both the Reconstruction Finance Corporation and the Comptroller of the Currency."

Despite these admissions, both the petition and supporting brief are replete with charges of "fraudulent concealment", references to "fraud", "the single act of fraud", and fraud which has been continuous. Nowhere, however, in either the petition or the brief does petitioner say what is the fraud of which he complains, how the fraud has been concealed or from whom it has been concealed.

Petitioner's case must stand upon his amended complaint (R. 15-23), which, however, unlike the free and easy charges in the petition and brief, contains only one charge of concealment. It avers concealment by City National and the individual defendants of only an alleged liability of that bank for the debt of Central Republic to the R.F.C. allegedly imposed under the Illinois Banking Act. It nowhere mentions "fraudulent concealment" or concealment of "fraud". The alleged concealment of such alleged liability is stated in the amended complaint (R. 19-20) to have been made in the regular reports of condition filed thrice annually subsequent to 1932 with the Comptroller of the Currency pursuant to the National Banking Act (12 U. S. C. § 161).

The record shows that in connection with the organization of City National the Comptroller of the Currency fully considered the question of liability under the Illinois statute referred to and decided that there was none (R. 55, 58-62). It further shows that the R.F.C. was fully acquainted with all of the facts, including the contract relating to the transfer of funds (R. 59-62, 65).

The Circuit Court of Appeals commented upon the opinion rendered to the Comptroller of the Currency by "his General Counsel" in discussing the knowledge of the facts by both the Comptroller of the Currency and the R.F.C. (R. 95). Petitioner, however, professes to be aggrieved by the Court's comments and apparently takes the position

that he has been foreclosed as to these matters (Br. 10, 11, 14). It is incredible that petitioner should find fault with these statements of the Circuit Court of Appeals when, as above shown, petitioner himself has fully admitted on the record that all of the facts, both as to the original loan and as to the transfer of funds between the two banks, were fully known to both the Comptroller of the Currency and the R.F.C.

The Circuit Court of Appeals in its opinion recognized and gave effect to these admissions by petitioner and referred to admissions of the same general tenor made by petitioner in his brief before that court (R. 95). In view of these repeated admissions, it is inconceivable that petitioner should at this time take the position that there was a concealment of any character from the government officials connected with these transactions.

Reply to Petitioner's Other Arguments.

In our opinion, the remainder of petitioner's brief and argument relate to the merits of this case. However, he has interrelated certain of his arguments upon the merits with his alleged reasons relied upon for the allowance of the writ (Petition 6). Although we feel that petitioner has gone far beyond the permitted provinces of a brief in support of a petition for certiorari and that these additional arguments should require no answer here, in order to avoid any misunderstanding, we feel it incumbent upon us to express most briefly our views upon these interrelated matters.

It is evident that petitioner has confused a common law action based upon fraud with an action created by statute. In the latter type of action, the plaintiff must bring himself within the exact terms of the statute under which he brings suit.

The case at bar is admittedly brought under the Informer's Act (Petition 1, R. 15) and, being a statutory action, is maintainable by petitioner only under the exact terms of that statute. The only acts of which petitioner can complain, or for which he could hope to recover in this suit if timely brought, must, therefore, be one of the acts enumerated in the Informer's Act. Those acts are all contained in Section 231.

The only acts prohibited by Section 231 to which any of the allegations of the amended complaint (R. 15-21) could possibly relate are those enumerated in the following summary. Under Section 231 any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, violates Section 231 if he does any one of the following (omitting those acts not pertinent here):

> (1) Makes or causes to be made or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent;
>
> (2) For the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry;
>
> (3) Enters into any agreement, combination or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim;
>
> (4) Having charge, possession, custody or control of any money or other public property used or to be used in the military or naval service, and with

> intent to defraud the United States or wilfully to conceal such money or other property, delivers or causes to be delivered to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt.

It is evident from the foregoing that each of the acts which contravene Section 231 relates essentially to one thing, namely, attempting to cause or actually causing the government to pay claims which were grounded in fraud. This Court, speaking through Mr. Justice Black, has specifically so declared in *United States* v. *Hess*, 317 U. S. 537, at page 544:

> "These provisions, considered together, indicate a purpose to reach any person who knowingly assisted *in causing the government to pay* claims which were grounded in fraud * * *." (Italics supplied.)

Necessarily, then, each of the acts defined in said section relating to fraudulent claims must precede in point of time the actual payment of a fraudulent claim by the government.

The only allegations in the amended complaint (R. 15-21) which could possibly precede the payment by the government or the R. F. C. of a claim of any character are those charging the individual defendants, as directors or as officers and directors of Central Republic, with obtaining the loan in question "by deceptive and untrue statements as to the value of insufficient collateral," knowing such collateral to be insufficient and that no further adequate collateral was available on demand (R. 17).

Since those allegations pertain to matters which occurred in 1932, and prior to the last payment of any money for and on account of said loan in October, 1932, they are insufficient to charge an act by any of the defendants within six

years before the commencement of the suit, viz.: June 22, 1943 (R. 2). It is evident that the allegations as to any act which occurred thereafter could not possibly be an inducement for or an attempt to cause the government to pay claims, fraudulent or otherwise. Consequently, they could not constitute the commission of an act within Section 231.

How, then, can any "transactions" alleged in the amended complaint or asserted in the petition or supporting brief which occurred subsequent to 1932, characterized by petitioner as "the act complained of" (Petition 5), "transactions in the completion of the *act* upon which the suit is based" (Br. 10), "successive transactions in the initiation and completion of the act" or "the single act of fraud" (Br. 18), constitute the commission of an act made actionable by Section 231? Also, how can the "liquidation of collateral and the enforcement of stock-holders' double liability" (Br. 10), which acts necessarily were only taken by the R. F. C., constitute the commission by any defendant of any act, made actionable by Section 231 or otherwise?

Petitioner also urges that the six-year period prescribed in Section 235 does not begin to run until the accrual of a cause of action, and that no cause of action accrued during six years prior to the institution of this suit.

The first part of the foregoing contention is clearly erroneous, for the inquiry necessitated by the unequivocal language of Section 235 is—When was the act committed? In *Rawlings* v. *Ray*, 312 U. S. 96, cited by petitioner in support of this argument (Br. 18), the inquiry was—When did the cause of action accrue? And rightly so, for the Arkansas statute there under consideration, which was an ordinary statute of limitations, specifically provided that the period should commence "after the cause of action shall accrue." Here, Section 235 specifically provides that the period shall commence "from the commission of the act, and

not afterward." There can be no question but that the act mentioned in Section 235 can refer only to an act which violates the provisions of Section 231, and that a cause of action accrues under Section 231 immediately upon the commission of an act in violation of said section.

Proceeding from his false premise, petitioner predicates the second portion of this phase of his argument upon the proposition that no cause of action can accrue until damages sustained by the R. F. C. or the government are ascertainable and the ultimate loss can be measured (Br. 18, 19).

In the first place, this argument is refuted by the specific provisions of Section 231. Simply reading this statute reveals that the mere making of a false or fraudulent claim or the presentment of such claim is a violation and, therefore, actionable, even though the United States never honors such claim. In the present case there was a complete and present cause of action, if at all, in 1932 when the alleged false representations were made for the purpose of inducing the loan. This also disposes of petitioner's further contention that "Damages as well as forfeiture must be sued for in the present case" (Br. 19).

Secondly, the only authority cited by petitioner in connection with this argument, *Bay City* v. *Frazier*, 77 F. 2d 570 (C. C. A. 6th, 1935), which he terms as "something of a parallel," is not in point. There, all of the services for which suit was brought constituted a single transaction, and the last service was performed on a date within the applicable state statute of limitations. Hence, the suit was not barred.

On the contrary, the decisions which research has disclosed uniformly hold that in cases involving misrepresentation as to collateral, the accrual of the cause of action does not depend upon or await the ascertainment of the amount

of damages, but that the cause of action accrues when the fraud is perpetrated, *i. e.*, when the loan is made by the lender in reliance upon the misrepresentation as to the collateral, or, where the particular state statute of limitations so provides, when the fraud is discovered.

Quinn v. *Press,* 140 S. W. (2d) 438, 440 (Tex. Sup. Ct., 1940);

Thayer v. *Kansas Loan & Trust Co.,* 100 Fed. 901, 903 (C. C. A., 8th, 1900);

Briggs v. *Brushaber,* 5 N. W. 383, 384 (Mich., 1880);

First National Bank v. *Steel,* 109 N. W. 423, 425 (Mich., 1906);

Merlau v. *Kalamazoo Circuit Judge,* 147 N. W. 503 505 (Mich., 1914);

White v. *Gordon,* 279 P. 289, 290 (Ore., 1929);

110 A. L. R. 1178;

128 A. L. R. 762.

The balance of petitioner's argument (Br. 21-39) relates solely to questions concerning the proper party-plaintiff and the alleged unconstitutionality of the 1943 amendment to the Informer's Act. These questions not only concern the merits of the case at bar, but also relate to matters which were not passed upon by the Circuit Court of Appeals. They are clearly far beyond the rightful province of a petition for certiorari or supporting brief, and, therefore, any answer thereto at this time would be premature.

Conclusion.

It is respectfully submitted that petitioner has not shown that the decision of the Circuit Court of Appeals is in conflict with applicable decisions of this Court, or any other recognized or proper reason for the allowance of a writ of certiorari, and, therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

ANDREW J. DALLSTREAM,
ARTHUR M. COX,
FREDRIC H. STAFFORD,
JOHN B. ROBINSON, JR.,
231 S. La Salle Street,
Chicago, Illinois,
Attorneys for Defendants-Respondents.

PAM, HURD & REICHMANN,
JOHN F. CASHEN, JR.,
Of Counsel.